



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
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NEW YORK, NY 10007-1866

RECEIVED

JUN 17 2019

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OFFICE OF THE
ASSISTANT COMMISSIONER

Mark Pedersen
Assistant Commissioner
New Jersey Department of Environmental Protection
Mail Code 401-406
401 East State Street
P.O. Box 420
Trenton, New Jersey 08625

MJP
SANA
Haymes
Kloo

Re: Application of Interim Groundwater Standards Identified by New Jersey Department of Environmental Protection at Federal-Lead Superfund Sites

Papperman

Dear Mr. Pedersen:

This letter will respond to your letter dated November 8, 2018 providing information in support of the position of the New Jersey Department of Environmental Protection (NJDEP) that interim groundwater quality criteria (IGWQC) established pursuant to N.J.A.C. 7:9C-1.7(c) should be recognized by the U.S. Environmental Protection Agency (EPA) as applicable or relevant and appropriate requirements (ARARs) under the provisions of Section 121(d) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9621(d), and Section 300.400(g)(4) of the National Contingency Plan (NCP). We understand your request to be both general and in anticipation of future issuance by NJDEP of IGWQC for additional contaminants.

As you know, consistent with CERCLA and the NCP, ARARs determinations are made on a site-by-site basis. As such, it would be inappropriate for us to make a general upfront determination that any and all existing or future IGWQC will or will not be identified as ARARs by EPA for federal lead Superfund sites that contain hazardous substances, pollutants or contaminants for which NJDEP has issued IGWQC. Having said that, we offer the following.

As previously indicated in Walter Mugdan's letter to you dated July 14, 2016, for a state law or regulation to constitute an ARAR under Section 121(d) of CERCLA, it must -- among other things -- be timely identified, more stringent than the federal standard, and promulgated. Rule-making procedures in New Jersey under the New Jersey Administrative Procedures Act (APA) require that an administrative agency give notice of its intended action in the New Jersey Register, provide a reasonable opportunity to submit data, views or arguments, fully consider all written and oral submissions, and prepare a report providing the agency's response to the data, view and arguments contained in the submission, with publication in the New Jersey Register to establish the effective date of the adopted regulation. As noted in the July 14, 2016 letter, these procedures had not been followed before issuance of the IGWQC then under discussion.

Your November 8, 2018 letter asks Region 2 to revisit its previous conclusion that NJDEP's IGWQC would likely be identified as "to be considered" (TBC) criteria, rather than ARARs. We have carefully reviewed the information provided in your letter, as well as the New Jersey Appellate Division decision that you reference, *Chemistry Council of N.J. v. New Jersey Department of Environmental Protection*, No. A-1439-15T4, 2017 N.J. Super. Unpub. LEXIS 3121 (N.J. App. Div. Dec. 19, 2017) (*Chemistry Council of N.J.*). By this letter we do not seek to question NJDEP's use of IGWQC in the context of investigation and cleanup work at sites addressed pursuant to New Jersey's own cleanup authorities. However, we continue to have the concerns expressed previously, that is, we are not persuaded that IGWQC are promulgated, within the meaning of CERCLA and the NCP. In addition, the *Chemistry Council of N.J.* decision does not appear to support your position.

EPA, however, does have discretion on a site-specific basis to identify NJDEP's IGWQC as TBC criteria in the federal-lead remedial investigation/feasibility study and remedy selection process where doing so will help establish protective remediation goals, consistent with Section 300.430(e)(2)(i) of the NCP. A useful point of comparison for the discussion of IGWQC is EPA's treatment of proposed maximum contaminant levels (MCLs) under the Safe Drinking Water Act which, depending on the site-specific circumstances, EPA may identify as TBC in establishing protective remediation levels. See the enclosed EPA document entitled, "ARARs Q's & A's: General Policy, RCRA, CWA, SDWA, Post-ROD Information and Contingent Waivers," July 1991, p.5. NJDEP has recently published notice in the New Jersey Register proposing both MCLs and final specific GWQC for perfluorooctane acid (PFOA) and perfluorooctanoic sulfonate (PFOS) of 14 ng/L and 13 ng/L, respectively. In the context of any investigations underway at EPA-lead Superfund sites in New Jersey, EPA expects to evaluate these proposed MCLs/GWQC as potential TBCs, considering on a site-by-site basis whether it would be appropriate to take them into account in setting remediation goals. When finalized, we would expect to evaluate the MCLs/GWQC as ARARs.

Please do not hesitate to call me if you wish to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "Pat Evangelista", with a stylized flourish at the end.

Pat Evangelista, Acting Director
Superfund & Emergency Management Division